FILE COPY

Office-Supreme Court, U.S.
FILED
FEB 9 1961
JAMES R. BROWNING, Clerk

NO. 339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

NEWS SYNDICATE COMPANY, INC. and NEW YORK MAILERS' UNION NO. 6, INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT NEWS SYNDICATE COMPANY, INC.

JOHN R. SCHOEMER, JR.
ANDREW L. HUGHES
220 East 42nd Street
New York 17, N. Y.
Attorneys for Respondent
News Syndicate Company, Inc.

INDEX

	PAGE
The Questions Presented	1
The Issues Presented:	
The Employer's Viewpoint	3
The Collective Bargaining Agreement	6
The Board's Expertise	8
Statement of Facts	12
The Case of Randall	14
Proceedings Before the Board	16
The Decision of the Court of Appeals	18
SUMMARY OF ARGUMENT	19
ARGUMENT	21
A. ABSENT PROOF OF ACTUAL COERCION OR EVIDENCE JUSTIFYING AN INFERENCE OF COERCION, A DUES REIMBURSEMENT ORDER AGAINST AN EMPLOYER IS ULTRA VIRES THE BOARD BECAUSE PUNITIVE AND NOT REMEDIAL	21
B. THE "CONFLICT" IN THE COURTS OF APPEALS AS TO THE APPROPRIATENESS OF THE REIMBURSEMENT REMEDY IS MORE APPARENT THAN REAL. FOR THE MOST PART, THE REMEDY HAS BEEN ENFORCED WHERE IT COULD BE JUSTIFIED AS REMEDIAL AND HAS BEEN REJECTED WHERE ITS APPLICATION WAS PENAL AND OPPRESSIVE	26
C. THE METHODS BY WHICH THE ORDER WAS IMPOSED ON THE NEWS IN THIS CASE ARE REPUGNANT TO PROPER ADMINISTRATIVE PROCEDURES	31
CONCLUSION	33
APPENDIX: BROWN-OLDS CASES IN THE COURT OF APPEALS	1a

CITATIONS

PAGE

CASES:

Brown-Olds Plumbing & Heating Corp., 115 NLRB 594 (1956) 4, 5, 8, 9, 17, 21, 23, 24

Building Material Teamsters, Local 282, etc. v. *N. L. R. B.*, 275 F. 2d 909 (2d Cir. 1960) 9, 30, 32, 2a

Consolidated Edison Co. v. *N. L. R. B.*, 305 U. S. 197 (1938) 21

Dixie Bedding Manufacturing Co. v. *N. L. R. B.*, 268 F. 2d 901 (5th Cir. 1959) 27, 30, 10a

Galveston Maritime Association, 122 NLRB 692 (1958) 24

Honolulu Star-Bulletin v. *N. L. R. B.*, 274 F. 2d 567 (D. C. Cir. 1959) 4, 5, 8, 1a

International Typographical Union, Local 38 v. *N. L. R. B.*, 278 F. 2d 6 (1st Cir. 1960), No. 340 this Term 2, 5

Lakeland Bus Lines, Inc. v. *N. L. R. B.*, 278 F. 2d 888 (3d Cir. 1960) 29, 5a

Langnes v. *Green*, 282 U. S. 531 (1931) 2

Local 357, International Bro. of Teamsters, etc. v. *N. L. R. B.*, 275 F. 2d 646 (D. C. Cir. 1960), No. 85 this Term 27, 2a

Local 425, Plumbers & Pipefitters Union, 125 NLRB No. 107 (1959) 24

Local Lodge No. 1424, Machinists v. *N. L. R. B.*, 264 F. 2d 575 (D. C. Cir. 1959), rev'd on other grounds 362 U. S. 411 (1960) 27, 30, 10a

Morgan v. *U. S.*, 304 U. S. 1 32

Morrison-Knudsen Company v. *N. L. R. B.*, 275 F. 2d 914 (2d Cir. 1960) 27, 29, 30, 3a

Morrison-Knudsen Company v. *N. L. R. B.*, 276 F. 2d 63 (9th Cir. 1960) 28, 4a

PAGE

N. L. R. B. v. *American Dredging Company*, 276 F. 2d 286 (3d Cir. 1960) 27, 29, 3a

N. L. R. B. v. *Broderick Wood Products Co.*, 261 F. 2d 548 (10th Cir. 1958) 24, 30, 9a

N. L. R. B. v. *District 50, United Mine Workers*, 355 U. S. 453 (1958) 21

N. L. R. B. v. *Express Pub. Co.*, 312 U. S. 426 (1941) 22

N. L. R. B. v. *Ford Radio & Mica Corp.*, 258 F. 2d 457 (2d Cir. 1958) 5

N. L. R. B. v. *General Drivers, etc., Local 886*, 264 F. 2d 21 (10th Cir. 1959) 10a

N. L. R. B. v. *Halben Chemical Co.*, 279 F. 2d 189 (2d Cir. 1960) 29, 6a

N. L. R. B. v. *Local 60 United Bro. of Carpenters, etc.*, 273 F. 2d 699 (7th Cir. 1960) No. 68 this Term 21, 27, 11a

N. L. R. B. v. *Local 111, United Bro. of Carpenters*, 278 F. 2d 823 (1st Cir. 1960) 27, 11a

N. L. R. B. v. *Local 176, United Brotherhood of Carpenters*, 276 F. 2d 583 (1st Cir. 1960) 27, 4a

N. L. R. B. v. *Local 294, Internat'l Bro. of Teamsters, etc.*, 279 F. 2d 83 (2d Cir. 1960) 12a

N. L. R. B. v. *Local 1566, ILA*, —— F. 2d ——, 46 LRRM 2073 (3rd Cir. 1960) 9a

N. L. R. B. v. *Local Union No. 85, Sheet Metal Wkrs. Int. Ass'n*, 274 F. 2d 344 (5th Cir. 1960) . 27, 1a

N. L. R. B. v. *Local Union No. 450, etc.*, 281 F. 2d 313 (5th Cir. 1960) 7a

N. L. R. B. v. *Mackay Radio & T. Co.*, 304 U. S. 333 (1938) 5

N. L. R. B. v. *Millwrights' Local 2232, District Council, etc.*, 277 F. 2d 217 (5th Cir. 1960) 4a

N. L. R. B. v. *Newspaper & Mail Deliverers' Union*, 192 F. 2d 654 (2d Cir. 1951) 5

N. L. R. B. v. *Operating Engineers, Local 382*, —— F. 2d ——, 46 LRRM 2544 (8th Cir. 1960) 8a

PAGE

N. L. R. B. v. *Revere Metal Art Co.*, 280 F. 3d 96 (2d Cir. 1960) 27, 30, 31, 12a

N. L. R. B. v. *Saltsman*, —— F. 2d ——, 47 LRRM 2002 (6th Cir. 1960) 27, 28, 8a

N. L. R. B. v. *Seven-Up Bottling Co.*, 344 U. S. 344 (1953) 9, 22

N. L. R. B. v. *United States Steel Corp.*, 278 F. 2d 896 (3d Cir. 1960) 29, 6a

N. L. R. B. v. *Wells*, 283 F. 2d 689 (6th Cir. 1960) 27, 30, 13a

Paul M. O'Neill Inter. Detective Agency Inc. v. *N. L. R. B.*, 280 F. 2d 936 (3d Cir. 1960) .. 27, 30, 12a

Perry Coal Co. v. *N. L. R. B.*, —— F. 2d ——, 47 LRRM 2208 (7th Cir. 1960) 27, 9a

Re Merchants' Stock & Grain Co., 223 U. S. 639 (1912) 22

Republic Steel Corp. v. *N. L. R. B.*, 311 U. S. 7 (1940) 22

Shear's Pharmacy, Inc., 128 NLRB No. 124 (1960) 9

Southeastern Plate Glass Co., 129 NLRB No. 50 (1960) 9

United Association, etc. of Plumbing & Pipefitting Industry, (Brown-Olds) 115 NLRB No. 594 (1956) 4, 5, 8, 9, 17, 21, 23, 24

United States v. *Carignan*, 342 U. S. 36 (1951) ... 2

Virginia Electric & Power Co. v. *N. L. R. B.*, 319 U. S. 533 (1943) 4, 19, 22-3, 24, 26

STATUTES AND RULES:

Administrative Procedure Act, § 5(a), 5 U. S. C. § 1004 32

PAGE

National Labor Relations Act, as amended (61 Stat. 136) 29 U. S. C. § 151, et seq.:

Section 8(a)(1) 3a, 6a
8(a)(2) 3a
8(a)(3) 8, 15, 3a, 6a
8(b)(1)(A) 6a
8(b)(2) 5, 6a
8(b)(3) 5, 8a
10(c) 18, 32

N. L. R. B. Rules and Regulations, 29 U. S. C. App. § 102.46(b) 32

TREATISE:

RESTATEMENT OF RESTITUTION, § 70 23

NO. 339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

NEWS SYNDICATE COMPANY, INC. and NEW YORK MAILERS' UNION NO. 6, INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT NEWS SYNDICATE COMPANY, INC.

The Questions Presented

The Court of Appeals for the Second Circuit has refused enforcement of the Board's order in this case on the grounds described in the Board's petition for certiorari and its statement of the "Questions Presented" (Br., p. 4).

In seeking an affirmance on the ground that the court below correctly decided the principal (and subsidiary) questions stated by the Board, as to whether the collective bargaining agreement established a discriminatory hiring system and unlawfully encouraged Union membership, this respondent will argue that (a) the Board's finding of fact

were properly reversed by the court below, and (b) the following question, presented to, but not reached by, the Court of Appeals, is to be considered here[1]:

> May the Board order an employer to reimburse its employees for dues and initiation fees paid to a union during the existence of an illegal hiring scheme tending to encourage union membership, in the absence of any evidence that (a) the employer actively coerced the employees into union membership or (b) derived direct benefit from the illegal hiring practices to such an extent that coercion may be presumed?[2]

In this brief will be found (a) a statement of the facts relevant to all questions presented to the Court, and (b) a law argument on the additional question being presented by this respondent.[3] The law argument on the question raised by the Board will be made by New York Mailers' Union No. 6 ("the Union"), the other respondent in this case, and by International Typographical Union (ITU), petitioner in No. 340, this Term, which will argue against the

---

[1]See *Langnes* v. *Green*, 282 U. S. 531, 538 (1931); *United States* v. *Carignan*, 342 U. S. 36, 38 (1951).

[2]A subsidiary question presented here is whether the Board properly ordered the dues reimbursement remedy on its own motion, without prior notice to the News that it would be sought and absent any application for such remedy by the Board's General Counsel, and without affording the News the opportunity to prove the absence of coercion.

[3]In view of the presentation being made to the Court in opposition to the Board's powers to apply the dues reimbursement remedy in *Carpenters' Local 60*, No. 68, this Term, the law argument on this question will be primarily that of an employer, and mere duplication of the general argument of the petitioner and *amicus* in No. 68 will be avoided.

Board's contention of *per se* illegality of the collective bargaining agreement.[4]

The Issues Presented: The Employer's Viewpoint

Burton Randall was a "moonlighter", in the current neologism, who augmented his regular livelihood by working weekends as a nonunion extra at respondent's newspaper in New York City. When other nonunion "extras" who worked more regularly than he were accepted into Union membership and were scheduled to be hired before him (although he still continued to work his regular weekend schedule), Randall filed a charge with the Board. By the time the Board reached a final determination, the case meanwhile having become another battleground between the Board and the ITU, both respondents were ordered to reimburse all Mail Room employees of the News for initiation fees and dues. The potential liability of this respondent under the Board's order now exceeds $350,000, and is growing at the rate of close to $7,000 as each month passes.

Aside from the staggering amount involved,[5] there are other disturbing implications in the Board's order in this case. Chief among these is the Board's refusal to recognize a double standard of liability between unions and employers

[4]In leaving this portion of the argument to the respondent Union, respondent News does not wish to be understood as thereby endorsing or accepting the Union's position in its entirety. Primarily the Union is arguing against those provisions of the Board's order initially recommended by the trial examiner, to which respondent News filed no exceptions. While the order found that the News had engaged in unfair labor practices, which the News by no means concedes to be correct, it was not then and is not now wholly opposed to every provision of the Board's order.

[5]The Court will observe that in No. 68, where the Board is putting up its main defense of the dues reimbursement order, the amount of dues in issue is $525 (Bd.'s br., p. 37).

in dues reimbursement orders. Whatever the liability of the latter may be, the employer, at least in this case, is being directed, allegedly on principles of unjust enrichment, to pay out amounts it is not holding and that have not even passed through its hands as checked-off dues. The Union and the News have been treated as *in pari delicto*, the News because it "participated" in maintaining a contract that the Board says was illegal and at least two Courts of Appeals[6] say was not.

Concededly the principles of *Virginia Electric* (*infra*, p. 22) have continuing vitality, and the News is not arguing that in no case may an employer—or for that matter a union—be compelled to reimburse employees for dues that they have been actually coerced into paying. But in this case those principles have been distorted beyond recognition.

Notwithstanding efforts of the employer and the Union to accommodate hiring procedures to Taft-Hartley requirements, efforts which the Board's General Counsel conceded were made in good faith (R. 129), the Board took the case of a single individual who it found had lost only one night's employment and some overtime because of those practices. (R. 682, 710) and inflicted punitive damages upon both employer and Union in an astronomical amount. An apparent purpose of the order is to compel employers, under the lash of the Brown-Olds remedy, to exert maximum economic force against a union seeking to retain hiring preference for its members. The ironic result is that the News, which is assumed under the Board's reasoning processes to have actively encouraged union membership on the part of its employees, is suffering a much heavier penalty than if

---

[6] In *Honolulu Star-Bulletin* v. *N. L. R. B.*, 274 F. 2d 567 (D. C. Cir. 1959), followed by the Court of Appeals in this case, the Court unqualifiedly rejected the Board's argument of *per se* illegality of the contract.

it had followed the contrary course of discouraging such membership.[7]

Nor is the News arguing that it should have been exonerated here because it honestly feared a costly strike if it did not accept ITU demands that its General Laws be incorporated and that the foreman be a member of the Union. Obviously such a defense will not avail an employer against direct and wilful participation in an unfair labor practice. *N. L. R. B.* v. *Newspaper and Mail Deliverers' Union*, 192 F. 2d 654, 656 (2d Cir. 1951). Deliberate evasion of the law on the part of these respondents is not an issue in this case in view of General Counsel's concession of their good faith (R. 129), and especially where the contract they signed has been found by at least two Courts of Appeals[8] to be free of the legal taint that the Board insists the parties should have foreseen.

The function of Brown-Olds orders, as proclaimed by Board representatives (*infra*, p. 24) is to serve as a "big stick", a "spur" to the abandonment of discriminatory

---

[7]The usual remedy for discouraging union membership is at worst reinstatement with back pay for discharged employees, if any, and a cease and desist order. See *N. L. R. B.* v. *Mackay Radio & T. Co.*, 304 U. S. 333 (1938); *N. L. R. B.* v. *Ford Radio & M. Corp.*, 258 F. 2d 457, 460 (2d Cir. 1958). So far as we are aware the Board has never in that class of cases sought enforcement of any order directing the employer to pay to the union the dues that would have been paid by his employees if he had not discouraged them from union membership, although such an order would have more logical and legal basis as a "remedy" than the one entered here.

[8]Both the Second Circuit in this case and the Court of Appeals for the District of Columbia in *Honolulu Star-Bulletin* v. *N. L. R. B.*, 274 F. 2d 567, have so held; *cf.* the First Circuit's decision in No. 340, this Term, holding that ITU locals had refused to bargain in violation of § 8(b)(3) and had attempted to cause employers to encourage union membership in violation of § 8(b)(2) by insisting on the incorporation of unspecified ITU General Laws, the legality of which was "not free from doubt" and of "honestly disputable validity" 278 F. 2d at 14.

hiring practices. The use of that stick on this respondent, under the circumstances of this record, is intolerable. Perhaps the Board's apocalyptic vision is correct, and we shall some day have a Peaceable Kingdom of labor relations where the wolf of trade unionism will dwell quietly with the nonunion lamb. But it is up to the Board, with the aid of court-enforced orders, to bring that about; employers should not be compelled under pain of this "remedy" to bring this about.

The Collective Bargaining Agreement

Justification of the provisions of the collective bargaining agreement attacked by the Board in this and related cases will be left primarily to the respondent Union, which (with its parent ITU) is the author of the challenged clauses.

However, as the Board has undertaken to impose joint liability, without distinguishing between the Union and the employers (or even between the ITU and the local Mailers' Union), some comments by the employers may be in order.

The charge made against the employers is that they joined forces with the ITU to enforce a closed shop in defiance of the Act. As they must have been aware of "the history of the ITU's efforts to maintain closed shop conditions and the role played by the General Laws in this effort" (Bd.'s br., p. 38), they should have foreseen that the consequences of this clause in the contract would be "the same as though the ITU and the publishers had specifically set out closed shop conditions in the contract" (*id.*, p. 39).

It is perfectly true that the ITU has tried to sail as close to the wind as possible in complying with the Taft-Hartley ban on the closed shop. It is also true that the newspaper

employers are aware of this, for indeed they have been often squeezed as a result. But there is no basis, either in this record or outside it, for the Board's conclusion that the contract between an ITU local and the New York City publishers provided for a closed shop. As the Court of Appeals found (R. 834), there was no preference given to Union members except as an extension of the fact that all competent and regularly available employees happened to be members of the Union.

Even if it is conceded that the Board correctly found the existence of *de facto* closed shop conditions, surely the mass dues reimbursement order is not an appropriate remedy against the employer that will effectuate the policies of the Act. Such an order allows of no middle ground to be steered by the employer between a ruinous strike on one hand and a heavy fine by the Board on the other. For many years ITU contracts had included a clause incorporating its General Laws; with the advent of Taft-Hartley, the only modification acceptable to the ITU was the provision which excluded those laws in conflict with federal law (R. 733-35). An employer who demurred at this was met with the assertion that the clause was legal, an opinion backed up by the expertise of ITU counsel gained in their struggles with the Board's General Counsel, in which they had by no means had the worst of it. Yet the rule now being advocated by the Board would seem to require the employer to decide at his peril what the Board would eventually determine to be the correct answer to this perplexing legal problem. The unfairness of such a rule is underscored where as here the employer's acceptance of the union argument is later vindicated by decisions of the Courts of Appeals.

That this was not a period of ready acquiescence by employers in ITU contract proposals is shown in the testi-

mony of Woodruff Randolph, ITU president. He conceded that as late as 1957, well after this case had been filed, the ITU membership was being told of the continuing "struggle with employers to maintain our General Laws as a basis of union shop operations" (R. 270). Such adamancy was not to be softened by arguments of employers, whose motives were in any case suspect because the Union knew that the employers were seeking any pretext to rid themselves of such contract provisions. Nor would it yield to the predictions by employer's attorneys of possible legal traps which ITU lawyers could show were as yet undefined by any court.

Perhaps the stigma of being adjudged guilty of an unfair labor practice must be accepted by a party to an agreement of that kind if it is later declared illegal. But it is entirely unwarranted to carry the remedial concept a long step further and to assess heavy financial liability against an employer who had no way of knowing if indeed it was illegal or if the Union was right in insisting that it was not.

The Board's Expertise

There may be a good deal of expertise and "enlightenment gained from experience"[9] underlying the Board's attack on the ITU's laws and its insistence that it by this time knows very well that the ITU wants to insure hiring preference for its members without resort to the union shop clause allowed by § 8(a)(3). But when it comes to shaping a remedy the Board's supposed expertness is submerged by its zeal to punish the supposed wrongdoers.

The punitive aspects of the Brown-Olds orders are so apparent on their face that the Board can no longer be allowed to mask the deficiencies in its deductive reasoning processes behind the claim of special competence to deal

[9] *N. L. R. B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 346 (1953).

with the problem. The wholesale use of the dues reimbursement remedy has led even a Board member to protest.[10] The Brown-Olds label is plastered across virtually every Board decision involving illegal hiring practices. Recognizing that that coercion of employees must be established in each case the Board routinely and mechanically decides that coercive methods may be conclusively presumed from illegal result. Decisions and orders are constructed not from the record in a particular case, but with catch phrases assembled by scissors and pastepot from other Board decisions[11].

This technique is illustrated in the Board's determination here that both the News and the Union merely by executing the contract, unlawfully encouraged employees to join the Union in order to obtain work at the News "thereby inevitably coercing those employees to pay initiation fees and dues" (R. 711). (The idea of coercion is derived from the original Brown-Olds case where employees were compelled by the employer to get union approval before starting to work.) The Board's syllogism appears to go as follows:

> By entering into the contract with the illegal General Laws provision the News encouraged its employees to become or remain members of the Union.
>
> This "inevitably" coerced them, i.e., the verbs "encourage" and "coerce" are interchangeable.

---

[10]Board member Jenkins, dissenting in *Shear's Pharmacy, Inc.*, 128 NLRB No. 124 (1960), questioned "the desirability of applying this form of remedy on a mechanical basis without the use of a factual frame of reference as a predicate for its imposition." See also: *Southeastern Plate Glass Co.*, 129 NLRB No. 50 (1960).

[11]The Second Circuit, in *Building Material Teamsters, Local 282, etc. v. N. L. R. B.*, 275 F. 2d 909, 912 remarked on the Board's practice of imposing Brown-Olds orders "more or less routinely and with regular incantation of the same words here recited".

> Therefore, the mere execution of the contract was enough to satisfy the Brown-Olds requirement of coercion.

There are flaws in both premises, but the most obvious one is that no encouragement was given by the employer, either by its enforced acceptance of the clauses demanded by the Union or by the functioning of the hiring procedures. Surely the Board must know from the other ITU cases that the problem is not to compel employers to stop forcing their employees into joining ITU locals, but to compel the latter to open membership lists and to permit the publishers to hire new employees of their own selection.[12]

Another lapse in the Board's expertise is its failure to distinguish between the parent ITU and the local Mailers' Union. Doubtless this is not a mere oversight, for it enables the Board to expound the novel doctrine of *respondeat inferior*, and to charge the local with the ITU's defiance of the Taft-Hartley Act.

No other case involving the ITU shows anything like the conscientious efforts made here by the Mailers' Union to bring traditional hiring methods into line with changing legal requirements. As far back as 1951 the Union, which had taken in 100 new members earlier that year, proposed to the publishers a plan for adding a like number of pro-

---

[12]As the Board's brief observes (p. 29), in 1947 Randolph announced that the ITU would not allow the Taft-Hartley Act to be used by employers to "shoe-horn" non-union men into a union composing room, and called for his members to strike before letting that happen. Ten years later he was still telling his members of the "struggle with employers to maintain our general laws as a basis of union shop operations" (R. 270). His views had not softened when he testified here that to allow the employer to determine "who members of the union were to be * * * is entirely repugnant to the history [and] tradition of the International Typographical Union". Yet one of those employers is now charged by the Board with "coercing" long standing ITU members into paying their dues.

bationary members (R. 564).[13] In 1954 a new procedure for hiring was jointly adopted by the publishers and the Union; it contained this significant provision (R. 561):

> "However, as among non-Union employees in the bargaining unit and as between such men and Union members therein, the Foreman is privileged to exercise any fair judgment of selection on the Publishers' behalf, provided only that the men of his choice be competent and that he not discriminate against or in favor of any men for their membership or non-membership in the Union."

This program continued in later years.[14]

Thus the Mailers' Union, although not desiring to sacrifice its ties to the ITU or to run counter to official ITU policy, took substantial and meaningful steps to avoid the charge that it sought unlawful preference for its members.

---

[13]The memorandum of the Publishers' Association of New York City, describing this plan to its members, is significant for two reasons: (1) it shows an attitude on the part of Mailers' Union officials that is in marked contrast to the official ITU position on the Taft-Hartley Act, and (2) it reveals that the problem of hiring practices was one with which the publishers were constantly struggling. Incidentally, it also shows (R. 565) a proposal by the Union that if a man did not wish to join the Union on a probationary basis, he was still to be preferred in hiring over junior men who had become probationary Union members.

[14]After the 1956 actions which at the News alone resulted in the acceptance of 31 extras into Union membership (*infra*, p. 15), and following the intermediate report in this case in 1959, the Union and the employers had further discussions on the problem and finally submitted to an arbitrator the question of establishing objective standards which would further eliminate any possible charge of discrimination in the hiring of extras. These standards, known as the Baar-award, were accepted by the Board as non-discriminatory in a case involving The New York Times (Case No. 2-CA-6432); in another case (No. 2-CB-2504), still pending before the Board, a trial examiner recommended dismissal of the complaint against the Mailers' Union, finding that the present hiring practices were not unlawful.

These facts were well known to the Board's General Counsel, whose representative made this concession at the hearings in this case (R. 129):

> "Mr. Examiner, may I state for the record that we don't question the good faith of the parties in trying to deal with this problem.
>
> "What we do allege here is that the conclusions they reached, or the practice that resulted and the contract that resulted, unfortunately, ran afoul of the provisions of the Taft-Hartley Act."

To concede that the Mailers' Union, like the News, acted in good faith, and then later to impute to the Union all of the base motives that the Board claims to have discovered on the part of the parent Union, is neither consistent nor equitable.

Statement of Facts

This case arises from the fact that in the publication of a large metropolitan newspaper like respondent's New York Daily News, manpower requirements in production departments vary widely from day to day. To satisfy these requirements, the employer must have available not only a regular work force, but others who can be called upon as needed.

In the Mail Room, part of the Delivery Department, 50 men may be enough to handle a "light" weekday paper, while perhaps 200 men will be needed when the Sunday paper is being produced on Friday and Saturday nights (R. 476). The nucleus of the work force is the ***regular situation holders,*** the journeymen employees who work five nights a week and who do not have to "shape" (apply for work before being hired) each night. Next come the ***regular substitutes,*** who fill in for absent regulars and are

the first ones called upon to augment the work force as needed. Finally, there are the *extras,* largely nonunion, who work the "heavy" nights after shaping and being hired by the foreman (R. 831).

Unlike regular substitutes, who must be available for work *throughout the week* and normally work a full five shifts, extras are nothing but casual employees, who are free to show up for work or not as they see fit. The extra is an "employee" only when he is hired, and then only for that particular night; he has no vested right to the job, and no official priority (seniority) under the collective bargaining agreement.

In the case of extras, the practice at the News was to employ a system of industry-wide seniority, and to give preference in hiring to men who were regularly employed in the industry as regular situation holders at the News or regular substitutes at other newspapers (all of whom happen to be Union members) as against nonunion men who merely "shaped" at the News but had no regular status in the industry (R. 121-22, 126). The Board continues to press its argument that this is proof of unlawful discrimination (Br., pp. 9, 37),[15] but the Court of Appeals rejected this contention, noting that the preferred men were those who had demonstrated competency and availability for steady work, as against casuals, or even regular extras, who could not be counted on to appear for work, except when it suited their own convenience (R. 831-34).

---

[15]The concept of industry-wide seniority, implicitly rejected by the Board's present claim that Randall was discriminated against when substitutes regularly working at other newspapers were hired before him, has elsewhere in this record been approved by the Board. In 1953 a Board staff attorney advised that, in negotiations involving extra men in the pressroom, the Board recognized and accepted the principle of industry-wide seniority (R. 577-79).

The Case of Randall

Burton Randall, by vocation an importer of shellfish and by avocation a part-time mailer at the News, started to work at the News in 1946 (R. 26). From 1951 on, Randall, although not a member of respondent Union, was regularly hired, like other nonunion extras, when he shaped at the News for a Friday and Saturday night job. Randall's regular job started at 5:00 A. M. Monday to Friday (R. 25), and he conceded that he could not handle two full-time jobs (R. 36). Hence he confined his work at the News to those nights when he did not have to work at his main job early the next morning. He was under no obligation to appear at the News and if he decided not to work on any weekend, the only consequence was that he lost a night's pay.

The policy of the Mailers' Union was to accept into membership only those who had demonstrated their competency at the trade and had achieved regular situation holder or regular substitute status. Extras were not eligible for membership, because they were not earning their livelihood at the trade (R. 181, 187-88, 193). As Smollon, the Union president, put it (R. 181):

> "We make the condition of holding employment and holding a job the qualifications for getting a card in our union. We don't make qualifications in our union the reason for holding a job."

In 1956, with the ready assent of the News, the Union developed a program for increasing the number of regular substitutes by working out with the News a plan for increasing the number of regular substitutes, moving up "extras" and accepting those who wished to join as members of the Union. The consent of the News was not given until full details of the Union's plan were presented, and

the whole arrangement represented arm's-length bargaining between the parties (R. 124-25).

Of the nonunion extras at the News, numbering about 60, 31 met the requirement of working regularly at the trade three shifts or more per week and were made regular substitutes after they had passed an examination to demonstrate their competency as journeymen. On June 10, 1956, 30 of these men, although junior in length of service to Randall, were upgraded to regular substitute status which gave them hiring priority over Randall (R. 833). Even before any of these men were hired ahead of him, Randall went to the Board to file a charge against the News and the Union. Actually, Randall continued to be hired every time he "shaped" on his regular nights (R. 43, 67, 674) except once on a "light" Sunday night when other nonunion extras were hired ahead of him (R. 22, 46).

The trial examiner found that Randall suffered no other reduction in earnings as a result of this change (R. 682), but the Board reversed, finding that he had lost possible overtime which he said had averaged 15-30 minutes a shift (R. 23) and was receiving less favorable work assignments (R. 710).

The record is clear that, had Randall decided to earn his livelihood from the newspaper business, rather than as a fish importer, he could have become a regular substitute and a Union member in 1956 or earlier. Or if the ITU had relented in its opposition to the Taft-Hartley Act, and complied with its filing requirements so that the Union could validly enter into a 30-day union shop agreement under § 8(a)(3), all full-time Mail Room employees at the News could have been compelled to become Union members within thirty days after employment, and if Randall had not become a member of the Mailers' Union, he at least would have been disqualified from complaining that the News was unlawfully "encouraging" him into such member-

ship. Unfortunately for the News, neither of these events occurred, and it remains confronted with the Board's dues reimbursement order.

Proceedings Before the Board

Randall complained to the Board's Regional Office that he was being discriminated against by the Union and the News because the newly promoted regular substitutes would be hired ahead of him. At about the same time a similar charge was lodged with the Board by an employee of The Wall Street Journal.[16]

After a prolonged hearing, in which Randall's charge soon disappeared from view as General Counsel launched an attack on the ITU's General Laws, the trial examiner issued an intermediate report in which it was recommended that both Union and employer be compelled to desist from further discriminatory hiring practices (R. 684-85, 687), and that certain allegedly illegal provisions of the collective bargaining agreement be neutralized (R. 686).

Both parties were directed to reimburse Randall for earnings lost when he was denied employment on a Sunday night after he had filed his charge with the Board.[17]

---

[16] Arrigale, a mailer employed as an extra at The Wall Street Journal, filed a charge similar to Randall's, and the cases were heard together by the trial examiner. Unlike Randall, Arrigale filed the charge only against the Union, and not the employer. The trial examiner's recommended order applied to both publishers (as well as, in certain other respects, all other New York City newspaper publishers, even though they were not parties to the proceeding). As The Wall Street Journal was not a party to the proceeding it was not subjected to the Board's Brown-Olds remedy, and is not directly a party to this appeal.

[17] After filing his charge at the Board's Regional Office Randall "shaped" at the News on a Sunday night. (The suspicion is that he did so at the instigation of a Board agent, and to entrap the parties, as he had to be at his regular job at 5:00 A. M. Monday and ordinarily did not seek Sunday night work at the News.) This was, incidentally, the one point on which the Board was successful in the Court of Appeals, which remanded the case to the Board to enter an order for that night's pay (R. 836).

The ensuing developments are of interest as an illustration of the vagaries of practice before the Board. Respondent News filed no exceptions to the trial examiner's report, put in no brief either for or against the report, and did not appear at or participate in the oral argument before the Board. Nowhere in the record up to this point had there been the slightest intimation that the dues reimbursement remedy was one which might appropriately be employed here. Indeed, at that time (October 1958) "Brown-Olds" was a name virtually unknown outside the construction industry where it was primarily employed by the Board as a weapon against the hiring hall. So far as the News was aware, if the trial examiner's recommendations were adopted by the Board and even if the General Counsel's exceptions were accepted by the Board, the News was required only to reimburse Randall for one night's pay, and possibly for some lost overtime, which seemed a small enough price to pay for the clarification of perplexing legal problems occasioned by incorporation of unspecified "legal" ITU General Laws and the contract requirement that the foreman who does the hiring be a member of the Union.

The News failed, however, to anticipate the zealousness of Member Fanning, the newest member of the Board, who at the close of oral argument asked General Counsel's representative[18] if he recommended the imposition of the Brown-Olds remedy. The equivocal reply was that General Counsel recommended Brown-Olds "wherever proper" (R. 525). The Board's decision treated this as a "request" by General Counsel for imposition of the Brown-Olds remedy (R. 710), although it is clear from the record that the dues

[18]The attorney from the General Counsel's staff who had actually prepared and tried the case was unable to argue the case before the Board, and the staff attorney who served as his substitute and who was prodded into this "recommendation" at the oral argument was without direct prior experience in this case.

reimbursement feature was incorporated by the Board *sua sponte,* and in defiance of the provision in § 10(c) of the Act that the trial's examiner's recommended order, if no exceptions are filed, "shall become the order of the Board".

As soon as the Board's decision was announced, the News filed a lengthy petition for rehearing (R. 729-49), but this was summarily denied (R. 752).

The Decision of the Court of Appeals

A unanimous Court of Appeals found that there was no warrant for the conclusion "that the hiring system in general, or the competency system in particular, by its discrimination against nonunion applicants, encouraged union membership" (R. 835). In a well-reasoned decision that showed the care with which the court had studied the record, it denied the correctness of the Board's finding that the foreman's hiring authority vested the Union with exclusive control over "hiring" at the News (R. 829), and affirmatively found that there was no reasonable ground for an employee to assume that his employment opportunities depended on membership in the Union (R. 830).

In addition to determining that execution of the collective bargaining agreement was not *per se* a violation of the Act (R. 830), the court held that in practice the hiring system at the News was valid and non-discriminatory either as to Randall in particular or mail room employees in general. While the Board now argues (Br., p. 8) that the Court's view of the facts "appears to be" dependent upon the erroneous premise that the contract did not incorporate the closed shop provisions of the ITU General Laws, in fact the Court found, wholly independent of the contract provisions, that in actual practice the employment procedures at the News were not violative of the Act. And it made this determination on the basis of

facts that stand largely uncontradicted in the record, without finding it necessary to reverse the Board on the weight of evidence or to accept testimony rejected by the Board. The Court noted that (R. 821) "in view of our conclusions on other dispositive issues, we need not discuss" the "numerous remedies" ordered by the Board.

It may be observed that the Board, in its argument to this Court, largely ignores the findings of the Court of Appeals, and repeatedly cites the trial examiner's report and the Board's decision as if they had been confirmed by the decision of the court below.

SUMMARY OF ARGUMENT

A. As the Board's power under the Act is to remedy, and not to punish, it may not properly require an employer to reimburse employees for dues or fees paid by them to a union during the existence of an illegal hiring system until it determines, on the basis of substantial evidence, that coercion was exerted by the employer against the employees. Coercion may be established either by (a) direct proof that the employer forced the employees into the union, or (b) by proof that the employer's participation in the hiring methods was of such measurable and significant benefit to the employer as to warrant the inference that coercion was used as a means of insuring continuance of the system.

Under the teachings of *Virginia Electric & Power Co. v. N. L. R. B.*, 319 U. S. 533 (1943), the Board exceeds its powers when, in the absence of proof of employer coercion, it uses the dues reimbursement order as a "deterrent", designed to punish past and present violators of the Act's prohibition against discriminatory hiring practices. In any case, the Board's remedial order must be "reasonably re-

lated" to the right which the Board is charged under the Act with protecting. The Brown-Olds order becomes a singularly inappropriate form of relief where the proof shows that the employees, without any encouragement from their employer, were either long standing union members or actively seeking union membership.

B. In this and many other cases involving employers, the Board has perverted the holding of *Virginia Electric* and has indiscriminately applied the dues reimbursement order as a penal system designed to compel employers to exert maximum economic pressure against a union which tries to win hiring preference for its members. Moreover, the Board has failed to recognize that circumstances such as are presented in this record may justify preference to union members, not because they belong to the union but because by reason of competency, availability and regularity of work they are entitled to be hired over nonunion men working as extras and looking elsewhere for their primary livelihood.

The Brown-Olds cases in the Courts of Appeals justify the conclusion that mere knowledge of the existence and operation of an illegal hiring scheme provides insufficient basis for the imposition of a dues reimbursement order against the employer. In every case where the court has denied enforcement against the employer, the facts show that the employer not only knew of the system, but more actively participated in its establishment and functioning than the News is shown to have done in this case.

The standards of liability advocated by this respondent in this case have found general acceptance in the Courts of Appeals which have considered orders that are designed to make an employer "disgorge" dues paid by their employees.

C. Moreover, the manner in which the dues reimbursement order was imposed upon the News cannot be condoned

as a matter of administrative procedure. At the very least it should have received advance notice that this liability might be inflicted, and afforded an opportunity to bring in affirmative evidence of its abstention from any form of coercion against its employees.

ARGUMENT

The law argument that follows, it will be recalled, does not deal with the question raised by the Board as to the interpretation of the collective bargaining agreement, and does not give a full exposition of the legal objections to the Brown-Olds doctrine. The Union's brief will argue the former, while the Brown-Olds argument here will be focused upon its effect upon employers, leaving it to the briefs of petitioner and the *amicus* in No. 68, *Carpenters' Local 60*, to present the union position.

A. ABSENT PROOF OF ACTUAL COERCION OR EVIDENCE JUSTIFYING AN INFERENCE OF COERCION, A DUES REIMBURSEMENT ORDER AGAINST AN EMPLOYER IS *ULTRA VIRES* THE BOARD BECAUSE PUNITIVE AND NOT REMEDIAL.

This Court's pronouncement in 1938 that the Board's "power to command affirmative action is remedial, not punitive", *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 236, is still the law.[19] As Chief Justice Hughes then stated (pp. 235-36), the Board's authority does not extend to "a punitive jurisdiction enabling the Board to inflict upon

[19] In *N. L. R. B.* v. *District 50, United Mine Workers*, 355 U. S. 453, 458 (1958) this Court again cautioned that the Board's power is not "limitless", but is contained by the statutory requirement that the remedy be "appropriate" and adapted to the situation calling for redress.

the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order". And of special pertinence here is the Court's later warning that the Act "does not prescribe a system of penalties or fines in vindication of public rights". *Republic Steel Corp.* v. *N. L. R. B.*, 311 U. S. 7, 10 (1940).[20] Again, in language that recalls the statements of the Board's General Counsel that he would use Brown-Olds as a "big stick" (*infra*, p. 24), the Court warned that a Board order could not be justified because it would act as a deterrent, for then the Board "would be free to set up any system of penalties which it would deem adequate to that end".[21]

It is not necessary to plunge into "the bog of logomachy"[22] by formulating precise tests which will, like a kind of litmus paper, determine whether a particular order is punitive or remedial. The conclusion that the Board has transcended its powers in this case can be reached upon an examination of the claimed source of those powers, this Court's decision in *Virginia Electric & Power Co.* v. *N. L. R. B.*, 319 U. S. 533 (1943).

---

[20]See also *N. L. R. B.* v. *Express Pub. Co.*, 312 U. S. 426, 435 (1941), where the Court said that "we can hardly suppose that Congress intended that the Board should make or the court should enforce orders which could not appropriately be made in judicial proceedings."

[21]*Republic Steel* at p. 12. In that case the Court refused enforcement to a Board order which would have required employers to reimburse local governments for work relief payments made to employees on an unfair labor practice strike. The Court remarked that such an order would be an "exaction" which would not make the employees whole or assure their right to bargain collectively.

[22]Mr. Justice Frankfurter in *N. L. R. B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 348 (1953). *Cf.* the definition in *Re Merchants' Stock and Grain Co.*, 223 U. S. 639, 641 (1912) where the Court said an order would be "deemed punitive when its purpose is to vindicate the authority of the court by punishing the act of disobedience as a public wrong".

In that case the Court held that where an employer interfered with the rights of its employees to self-organization and collected union dues from them which it turned over to a company-dominated union for its support, the Board had the right to direct the employer to reimburse its employees for the payments illegally exacted. The Court's invocation of the principle of restitution as a remedy for the unlawful coercion is unmistakably clear in this language from the majority opinion (p. 544):

> "The purpose of the order is not to penalize the Company by requiring repayment of sums it did not retain in its treasury. Those sums did go into the treasury of the Company's creature to accomplish purposes the Company evidently believed to be to its advantage, and the order of reimbursement is intended to remove the effects of this unfair labor practice by restoring to the employees what would not have been taken from them if the Company had not contravened the Act".

Today the Board dismisses the company union aspect of *Virginia Electric* as merely incidental, and argues that "domination of the union was simply the unfair labor practice which brought the Board's remedial powers into play" (Br. in No. 68, p. 32). However the question may arise, the *sine qua non* of the case is coercion, which is equated with fraud: a person who has conferred a benefit upon another in a void or voidable transaction because of duress or undue influence is entitled to restitution as if he had been defrauded.[23]

In the *Brown-Olds* case, 115 NLRB 594 (1956), the Board carefully and correctly stated the rule of *Virginia Electric* that restitution is a remedy for coercion. Empha-

---

[23] RESTATEMENT OF RESTITUTION § 70. Incidentally, the Board cited this work to the Court of Appeals, apparently for the proposition that the News might have a right of contribution from the Union, if it has to make reimbursement as directed by the Board (Br. p. 35).

sizing that the dues and assessments there collected by the union "constituted the price these employees paid in order to retain their jobs" the Board held that "reimbursement" was "necessary to expunge the illegal effects of the unfair labor practices", because "otherwise the very fruits of the unfair labor practice itself will remain in the hands" of the union.

In the first case in which reimbursement of dues by an employer found to have "encouraged" union membership was ordered, *N. L. R. B.* v. *Broderick Wood Products Co.*, 261 F. 2d 548 (10th Cir. 1958), the Board succeeded in winning enforcement of its order on proof that the employer had discharged or suspended 60 employees to coerce them into submitting to an unlawful security clause and becoming members of a union to which they did not wish to belong. On a record amply justifying the finding of coercion, the court agreed that the principles of *Virginia Electric* were sufficiently broad to authorize this remedial action by the Board.

Within the Board's own confines, the Brown-Olds doctrine underwent searching "re-examination".[24] When it re-emerged, deterrence became the watchword.[25] The Board's General Counsel was frank to announce these purposes: Brown-Olds would be used as a "sword", a "stick", a "spur" to compliance with the Act.[26] As it was obviously difficult for the Board to rationalize, on principles of resti-

---

[24]In *Galveston Maritime Association*, 122 NLRB 692, fn. 18 (1958), the Board explained that Brown-Olds had been withheld in an earlier case because the Board "was still in the process of re-examining the *Brown-Olds* principle".

[25]"The reimbursement remedy more properly effectuates the purpose of the Act because it provides not only a deterrent to future violations but an incentive to future compliance." *Local 425, Plumbers and Pipe Fitters Union*, 125 NLRB No. 107 (1959).

[26]The documentation of these statements appears in the *amicus* brief in No. 68, pp. 23-25.

tution, an order directing the reimbursement by an employer of amounts that he had never received, the Board began to adopt the principle of treating the employer as *in pari delicto* with the union. This technique is illustrated in the present case where, after declaring that the Act would be frustrated if the union were permitted "to retain" the unlawfully exacted dues, the Board in the next sentence directs *both* the Union and the employer to refund the dues to the employees "jointly and severally" (R. 711). The missing link in the Board's reasoning was explained to the Court of Appeals (Bd's br., p. 34) on the ground that the News had "participated equally in the coercion which encouraged union membership". Mere "participation", however, in the absence of any proof of benefit received or to be expected, is not a proper canon of liability under the statute being administered by the Board, however suitable it might be in a criminal case.

Nor is the Board's plea that coercion may be difficult of proof a justification of what the Board has been doing in these cases. Perhaps it would be unfair, as the Board argues (Br. in No. 68, p. 27), to demand that the Board parade the employees across the witness stand to testify that they had been coerced. But it is considerably less "fair" (*id.*, p. 28) to conclude the opposite, that coercion must have existed because the employer took no effective steps to discourage the employees' desire to join the union. Even the Board's power to synthesize sweeping conclusions from sketchy facts cannot save this type of reasoning.

The Board concedes that, for a remedy to lie within its authority, it must be "reasonably related" to the right which it purports to vindicate (*id.*, p. 22). In the context of this case, the right which the Board is protecting is the right of the employee to be free from coercion into union membership. There is no relation, reasonable or otherwise,

between that right and the reimbursement remedy against a non-coercive employer. And the Board's remedial powers are far transgressed when, without a shred of proof that the employer either coerced its employees or derived some benefit which might justify the inference of coercion, the Board commands the reimbursement by the employer of dues to employees who, as this record indicates, are fighting for the chance to become Union members.[27]

B. THE "CONFLICT" IN THE COURTS OF APPEALS AS TO THE APPROPRIATENESS OF THE REIMBURSEMENT REMEDY IS MORE APPARENT THAN REAL. FOR THE MOST PART, THE REMEDY HAS BEEN ENFORCED WHERE IT COULD BE JUSTIFIED AS REMEDIAL AND HAS BEEN REJECTED WHERE ITS APPLICATION WAS PENAL AND OPPRESSIVE.

With each new decision by a Court of Appeals dealing with the mass reimbursement of dues remedy, it becomes more apparent that the conflict betwen circuits over the appropriateness of this remedy can be resolved by a reaffirmation of the principles of *Virginia Electric*, and would never

[27] While the Court of Appeals found only that "for aught that appears in the record" Randall and the extras who did not meet the established standard were anxious to join the Union (R. 835) and that the Union membership of most employees antedated passage of the Taft-Hartley Act (R. 831), it could fairly be concluded that the nonunion employees actively sought union membership (R. 101, 104, 199). Thus, when in 1956 the Union won the assent of the News to its plan of promoting extras to regular substitute status and accepting them as union members, every one of the 31 employees selected for advancement applied to and was accepted by the Union. Indeed, Burton Randall testified that he too wanted to join the Union (R. 43, 78), but he was not acceptable because he was working less than the number of weekly shifts which the respondents considered (R. 124-26, 189-90) (and the Court of Appeals agreed, R. 833-34) was minimum evidence of availability for work throughout the week and desire to work at the trade as a primary means of livelihood.

have arisen if the Board had not departed from those principles. For the most part, the remedy has been sustained where it was evident from the circumstances of the case that the employees were actually coerced into paying the dues; it has been refused enforcement where the Board announced its doctrine of "inevitable coercion" but where coercion was not established by or fairly inferable from the evidence.

This is best illustrated by a comparison of cases decided in seven circuits that now have ruled both ways on the question.[28] The most recent instance is a decision by the Seventh Circuit, which had earlier enforced the remedy in *Local 60, Carpenters*, No. 68 this Term, but which refused enforcement of a Brown-Olds order in *Perry Coal Co.* v. *N. L. R. B.*, F. 2d , 47 LRRM 2208.

The Board's order there directed an employer and a union, jointly and severally, to reimburse dues paid by the employees to the union. After correcting the impression of

---

[28] First Circuit: *N. L. R. B.* v. *Local 111, United Bro. of Carpenters*, 278 F. 2d 823 (enforced); and *N. L. R. B.* v. *Local 176, United Bro. of Carpenters*, 276 F. 2d 583 (not enforced).

Second Circuit: *N. L. R. B.* v. *Revere Metal Art Co.*, 280 F. 2d 96 (enforced); and *Morrison-Knudsen Company* v. *N. L. R. B.*, 275 F. 2d 914 (not enforced).

Third Circuit: *O'Neill Int. Detective Agency* v. *N. L. R. B.*, 280 F. 2d 936, (enforced); and *N. L. R. B.* v. *American Dredging Company*, 276 F. 2d 286 (not enforced).

Fifth Circuit: *Dixie Bedding Manufacturing Co.* v. *N. L. R. B.*, 268 F. 2d 901 (enforced); and *N. L. R. B.* v. *Local Union, No. 85, Sheet Metal Wkrs. Int. Ass'n*, 274 F. 2d 344 (not enforced).

Sixth Circuit: *N. L. R. B.* v. *Wells*, 283 F. 2d 689 (enforced); and *N. L. R. B.* v. *Saltsman*, F. 2d , 47 LRRM 2002 (not enforced).

Seventh Circuit: *N. L. R. B.* v. *Local 60, United Bro. of Carpenters*, 273 F. 2d 699, No. 68 this Term, (enforced); and *Perry Coal Co.* v. *N. L. R. B.*, F. 2d , 47 LRRM 2208 (not enforced).

D. C. Circuit: *Local Lodge No. 1424, Machinists* v. *N. L. R. B.*, 264 F. 2d 575 (enforced), rev'd on other grounds, 362 U. S. 411; and *Local 357 Teamsters* v. *N. L. R. B.*, 275 F. 2d 646, No. 85 this Term (not enforced).

the Third Circuit that the decision in No. 68 had accepted the Board's argument that the "presumption of coercion is conclusive once the unfair labor practice is shown", the court said:

> "Inasmuch as there are no findings of actual coercion in the instant case nor any evidence which would have supported such findings, we hold that part of the order requiring reimbursement of dues paid, should not be enforced."

Those cases in which Courts of Appeals have sustained the remedy in part, but have rejected it as applied to all employees, also demonstrate that proof of coercion is an essential element to the appropriateness of this remedy. For example, in *Morrison-Knudsen Company* v. *N. L. R. B.*,[29] the Ninth Circuit enforced a reimbursement of dues order against an employer and the union as to five college students who were coerced into joining the union to get summer jobs, but it rejected the Board's broad order requiring reimbursement to all employees, remarking that (p. 76) "reimbursing a lot of old-time union men could not be 'anything but a windfall to the employees and an unjust penalty to the employer' ". And in *N. L. R. B.* v. *Saltsman*,[30] the Sixth Circuit restored the order recommended by the Trial Examiner limiting the reimbursement to those employees who joined the union during the course of the project when the unlawful assistance to the union occurred, rejecting the Board's contention that union men who were members of the union before going to the project were "inevitably coerced" to "remain members" by the unlawful assistance.

---

[29] 276 F. 2d 63 (9th Cir. 1960).

[30] F. 2d , 47 LRRM 2002 (6th Cir. 1960), enforcing in part 123 NLRB 1176 (1959).

The necessity of proving actual or presumptive coercion is also illustrated by those cases in which an employer[31] has been subjected to the remedy. In several of the cases where enforcement of the remedy against an employer was refused, it appeared that a majority union was involved and that the union had secured unlawful preference in hiring for its members or had caused the employer to discriminate against a non-member or member not in good standing. In such cases, the courts concluded that reimbursement of dues would be a windfall to the union members, who had profited by the unlawful practice, and was an unjust penalty to the employer.[32]

The substantial distinction between the position of an employer that did not collect the dues and the union which

[31] For purposes of the statistical comparison which follows, all cases in which mass reimbursement of dues was ordered generally by the Board in favor of all employees in the bargaining unit will be treated as Brown-Olds cases. It should be understood, however, that the Board's incidence of success in cases where the union represented only a minority of the employees, or was company-assisted, has been much higher than in the cases involving a union clearly representing a majority of the employees, of which the instant case is an illustration. Without attempting to divide the cases into majority and minority union groups, the overall statistics are as follows:

An employer has been involved in 17 of the 27 Brown-Olds cases decided by the Courts of Appeals since November, 1958. A count shows that, after a slow start, "enforcement denied" has now gone definitely ahead of "enforcement granted" by a score of 17 to 10 over all; "enforcement denied against employers" leads "enforcement granted against employers" by a score of 11 to 6, while "enforcement denied against unions" leads "enforcement granted against unions" by 11 to 7 in the 18 cases in which unions are involved. A short summary of each of these 27 cases appears in Appendix to this brief.

[32] See, e.g., *N. L. R. B.* v. *American Dredging Company*, 276 F. 2d 286 (3rd Cir., 1960); *N. L. R. B.* v. *United States Steel Corp.*, 278 F. 2d 896 (3d Cir. 1960); *Lakeland Bus Lines, Inc.* v. *N. L. R. B.*, 278 F. 2d 888 (3d Cir. 1960); *N. L. R. B.* v. *Halben Chemical Co.*, 279 F. 2d 189 (2d Cir. 1960); *Morrison-Knudsen Company* v. *N. L. R. B.*, 275 F. 2d 914 (2d Cir. 1960).

did retain them has been noted by the Second Circuit.[33] In denying enforcement against both the union and the employer, the court observed that "requiring reimbursement by the union is less oppressive than demanding it of the employer, since the union at least received the dues". In another case,[34] where only the employer was charged, the same court remarked that it was unfair to require the employer to pay back all of the dues collected by the union, which although "the primary beneficiary of the unlawful conduct and undeniably the most culpable" was permitted to retain the funds unlawfully exacted by it.

In five of the six cases where the mass reimbursement remedy was enforced against an employer, the employer either had actively participated in the unlawful coercion or had a purpose to be served by the unlawful conduct. Thus, in *Broderick Wood*,[35] the employer actually suspended and threatened its employees with discharge if they failed to put themselves in good standing with the union. In four other cases,[36] the employees were compelled to pay dues to a minority or company-assisted union by virtue of an unlawful union shop clause agreed to and enforced by their employers, in some instances to avoid dealing with some other union and in other instances because the employer did not bother to check the union's claim that it represented a majority. In the sixth case, the circumstances warranting imposition of the remedy did not appear.[37]

---

[33] *Building Material Teamsters, Local 282, Etc.* v. *N. L. R. B.*, 275 F. 2d 909, 912 (2d Cir. 1960).

[34] *Morrison-Knudsen Company* v. *N. L. R. B.*, 275 F. 2d 914, 918 (2d Cir. 1960).

[35] *N. L. R. B.* v. *Broderick Wood Products*, 261 F. 2d 548 (10th Cir. 1958).

[36] *Local Lodge No. 1424, Machinists* v. *N. L. R. B.*, 264 F. 2d 575 (D. C. Cir. 1959); *Dixie Bedding Manufacturing Co.* v. *N. L. R. B.*, 268 F. 2d 901 (5th Cir. 1959); *N. L. R. B.* v. *Revere Metal Art Co.*, 280 F. 2d 96 (2d Cir. 1960); and *O'Neill Int. Detective Agency* v. *N. L. R. B.*, 280 F. 2d 936 (3d Cir. 1960).

[37] *N. L. R. B.* v. *Wells*, 283 F. 2d 689 (6th Cir. 1960).

Another significant, perhaps not controlling, factor in the employer cases is that in each instance it appears[38] that dues were checked off by the employer and paid over to the union. There was no checkoff here; employees paid their union dues directly to the Union (R. 506). While the presence or absence of a checkoff should not be the point on which the employer's liabilty turns, its presence is significant because it tends to show that the union needed employer assistance to maintain its position. In the case of a long-standing union like the Mailers, it is perfectly obvious that no employer help was asked or required for it to maintain its majority position in the newspaper shops.

Thus, the standards of liability that may be shaped for application to coercive unions will not suffice for employers who have not received the dues being reimbursed. The mechanical application of joint and several liability to both if the Board believes that the fault of either is shown, and without any effort to divide responsibility between them, is inherently wrong, for as the Second Circuit observed in *Revere Metal Art Co.*, 280 F. 2d 96, 101:

> "In an appropriate case we might think a different view ought to be taken with respect to an employer who has been forced into an unfair labor practice by economic pressure from a labor organization."

C. THE METHODS BY WHICH THE ORDER WAS IMPOSED ON THE NEWS IN THIS CASE ARE REPUGNANT TO PROPER ADMINISTRATIVE PROCEDURES

We have already observed that the News, in the mistaken belief that its maximum back pay liability was a few

[38] It is not always clear from the report whether a checkoff actually existed, but in cases such as *Revere Metal Art Co.*, where the Board's order directed reimbursement of dues "paid or checked off" we have assumed that the contract provided for a checkoff.

hundred dollars because that was all General Counsel sought, found itself with potential liability of more than a quarter of a million dollars after the Board acted on the exceptions to the intermediate report (*supra*, p. 17). The News had been given no chance to introduce evidence as to whether its employees were coerced into joining the Union or remaining members of the Union. Certainly the requirements of a fair hearing include the right to know the claims of the opposing party and to meet them. See *Morgan* v. *U. S.*, 304 U. S. 1, 18 (1938); *cf.* Administrative Procedure Act, § 5(a), 5 U. S. C. § 1004. Moreover, the Board ignored its own Rules and Regulations which provided (§ 102.46(b)) that "no matter not included in a statement of exceptions may thereafter be urged before the Board". General Counsel had not excepted to the examiner's failure to recommend dues reimbursement. The Board explained to the Court of Appeals (Br., p. 32) that this section was "designed to place a limitation upon what the parties may litigate before the Board, not upon the Board's remedial powers".

Finally, the Board ignored the provision found in the last sentence of § 10(c) of the Act, which makes the trial examiner's recommended order the order of the Board if no exceptions are filed. As General Counsel had never sought the imposition of the Brown-Olds remedy, and of course had filed no exceptions to the omission of such a remedy from the recommended order, the Board was powerless to add the reimbursement direction on its own motion. See *Building Material Teamsters, Local 282, etc.* v. *N. L. R. B.*, 275 F. 2d 909, 913 (2d Cir. 1960).

CONCLUSION

The whole thrust of the Board's argument in this case is that the News ought to have foreseen that its contract with the Union would some day be held illegal, and should have let the Union strike before it agreed to sign the contract. If the News is culpable in this respect, the Board's remedial authority is confined to an order defining the area of illegality and prohibiting its maintenance in the future. The absence of proof of actual or constructive coercion by the News of its employees, or of wilful evasion of the Act by the terms of the contract under attack by the Board, are sufficient to exonerate the News from liability to reimburse dues to its Mail Room employees.

If this case should be remanded to the Court of Appeals on the principal issue raised by the Board (Bd.'s br., p. 4), respondent News naturally hopes that the Court's decision in this or No. 68 will so define the scope of the Board's powers to order dues reimbursement as to relieve the News from that feature of the order in this case.

It is submitted, however, that the Court of Appeals correctly denied enforcement of the Board's order, and its judgment should be affirmed.

Respectfully submitted,

JOHN R. SCHOEMER, JR.,
ANDREW L. HUGHES
220 East 42nd Street
New York 17, N. Y.
Attorneys for News Syndicate Company, Inc.

February 8, 1961